

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 04-11191  
Non-Argument Calendar

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<p><b>FILED</b> <b>U.S. COURT OF APPEALS</b> <b>ELEVENTH CIRCUIT</b> November 16, 2005 <b>THOMAS K. KAHN</b> <b>CLERK</b></p>
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D. C. Docket No. 03-00095-CR-1-WS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY JAMES GARNER,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Alabama

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(November 16, 2005)

**ON REMAND FROM THE  
SUPREME COURT OF THE UNITED STATES**

Before CARNES, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The United States Supreme Court has remanded this case for us to reconsider the sentence imposed in light of *United States v. Booker*, 543 U.S.\_\_\_\_, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). *Garner v. United States*, 126 S. Ct. 41 (2005). As Garner acknowledged in his reply brief when we first heard his appeal of his sentence, he did not raise his *Booker* objection<sup>1</sup> in his initial brief but raised it in his motions for supplemental briefing on the issue. Normally, under our established prudential rule, we would not consider issues not raised in the initial briefs on appeal. *United States v. Levy*, 416 F.3d 1273, 1275-76 (11th Cir. 2005) (per curiam). The fact that the Supreme Court has remanded a case to be reconsidered in light of *Booker* does not “mandate any particular outcome as to the defendant’s sentence, nor [does it] preclude this Court from applying its prudential rules in a uniform and consistent manner.” *Id.* at 1280 (citations omitted). Accordingly, having applied our prudential rule, we affirm Garner’s sentence and reinstate our panel’s prior decision in *United States v. Garner*, No. 04-11191 (11th Cir. Dec. 22, 2004).

### **AFFIRMED AND PRIOR OPINION REINSTATED**

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<sup>1</sup>At the time of his initial appeal, *Booker* had not been decided, and Gary raised his objection under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).